IN THE SUPREME COURT OF THE ST ATE OF MONTANA

Supreme Court Cause No. DA 10-0099

IN THE MATTER OF THE ESTATE OF:

WILLIAM F. BIG SPRING, JR.,
Deceased.

JULIE BIG SPRING AND WILLIAM BIG SPRING, III,

Appellants,

v.

ANGELA CONWAY, DOUG ECKERSON, and GEORGIA ECKERSON,

Appellees.

APPELLANT'S BRIEF

ON APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
the HONORABLE LAURIE McKINNON presiding

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STATEMENT OF ISSUE

Whether the District Court's assumption of jurisdiction over the probate of a Blackfeet tribal member resident on the Blackfeet Indian Reservation at the time of his death and where all property of the estate was located on the Blackfeet Indian reservation, unlawfully infringed on the Blackfeet Indian Tribe's right of tribal self-government.

STATEMENT OF THE CASE

This matter arises from an appeal from the Ninth Judicial District Court of Glacier County, denying the Motion of William Big Spring III and Julie Big Spring (hereinafter referred to as, "William III and Julie"), to dismiss the District Court probate for lack of subject matter jurisdiction. William III and Julie Big Spring, natural children of the deceased, asserted that the District Court lacked jurisdiction over the probate of the estate of their father William F. Big Spring II, an enrolled Blackfeet Tribal member who was resident on the Reservation at the time of his death and where the only reported asset of the deceased was Indian fee land within the Reservation. *Motion to Dismiss*, pg. 2-5. William III and Julie asserted that the District Court's exercise of jurisdiction over the probate unlawfully infringed on the Blackfeet Tribe's right of self-government, and therefore could not withstand challenge. *Id.*

The Respondent's in the case are Angela Wyrick Conway, a natural child of the deceased by a different mother (hereinafter referred to as, "Angela"), and Doug Eckerson (hereinafter referred to as, "Eckerson") , who is the current putative legal title holder of the estate land and a purported creditor of the estate. In response to the motion to dismiss for lack of jurisdiction, relying on the United States Supreme Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al.*, 554 U.S. ____, 128 S.Ct. 2709 (2008), Eckerson asserted that the District Court did have jurisdiction as the only reported asset of the Big Spring estate was non-Indian fee land. *Eckerson's Response Brief*, pgs. 4-7. Also relying on *Plains Commerce Bank*, Angela argued that pursuant to *State ex rel. Iron Bear v. District Court*,162 Mont.335, 512 P.2d 1292 (1973) and *Estate of Standing Bear v. Belcourt*, 193 Mont. 174, 631 P.2d 385 (1981), the District Court has jurisdiction even over Indian fee land. *Angela's Response Brief*, pgs. 2-5. Both asserted that the Tribal Court had no jurisdiction. *Eckerson's Response*, pg. 4 & 6, *Angela's Response*, pg. 1-2.

Agreeing with Angela and Eckerson, the District Court opined that while the Tribal Court may have concurrent jurisdiction, because the land was fee land, pursuant to the rules announced in *State ex rel. Iron Bear v. District Court*,162 Mont.335, 512 P.2d 1292 (1973), the district court's "exercise of jurisdiction over fee property within the exterior boundaries of the Blackfeet Indian Reservation will

not interfere with the Reservation's right of self-government." *Order Denying Motion to Dismiss*, pg. 6. While the District Court appeared to acknowledge that the case was about Indian fee (rather that non-Indian fee) property, it seems to have based part of its conclusion on the misplaced belief that the exercise of tribal court probate jurisdiction somehow abridged or interfered with the "principal enunciated in *Plains* regarding the alienability of fee property . . .." *Id.*

Based on its views of the principles in the *Plains Commerce Bank* case, the District Court concluded that the Blackfeet Tribe no longer had plenary authority over fee land within the Reservation. The District Court did not address William III and Julie's argument that it was the court's assumption over the underlying probate which unlawfully infringed on tribal self-government. Nor did the district court indicate how the exercise of tribal probate jurisdiction would contravene the principle of alienability of fee land espoused in the *Plains* case.

STATEMENT OF FACTS

The deceased, William F. Big Spring Jr., died intestate on July 26, 2003. *Order Denying Motion to Dismiss*, pg. 2. Big Spring was an enrolled member of the Blackfeet Indian Tribe, and at the time of his death he was a resident of the Blackfeet Indian Reservation. *Id.* The estate consisted of Indian trust land, non-trust personal property and Indian fee property, all of which is located within the

Blackfeet Indian Reservation. *Inventory and Appraisement, Schedule A (listing land description for fee land); Eckerson's Response Brief to Motion to Dismiss, Exhibit A (trust estate).* The deceased Big Spring's Indian fee property consisted of approximately 1,300 acres of land and 2 residential lots with a home in East Glacier. *Inventory and Appraisement, Schedule A (listing land description for fee land.)* The deceased owned no property, real or personal, outside of the Blackfeet Indian Reservation. *Eckerson's Response Brief to Motion to Dismiss, Exhibit B(maps showing actual location of fee land).*

On September 24, 2004, an informal probate was commenced in the Ninth Judicial District Court for Glacier County, Montana, by Georgia Eckerson (natural mother of William Big Spring III and Julie Big Spring) by filing an application for informal appointment of personal representative in intestacy. *Application for Informal Appointment of P.R.*. Accompanying that application were requests for appointment of personal representative from William III and Julie requesting that their Mother, (the deceased's ex-wife) Georgia Eckerson be appointed the Personal Representative of the Estate of William Big Spring Jr.. *William III and Julie's Request for Appointment of P.R.*.

The clerk of the District Court granted the appointment of Georgia Eckerson as the Personal Representative of the William Big Spring Jr. estate. *Order of Informal Appointment.* Thereafter, Georgia purported to pay creditors and

otherwise manage the estate. During this time, Georgia, the Personal Representative, was apparently accepting assistance from her ostensible ex-husband Doug Eckerson in the form of money and assistance. *Doug Eckerson's Claim Against Estate pg. 2 and Exhibit A, thereto.*

Sometime in early 2006, Georgia had purported to sell all the estate's non-trust fee land (1,300 acres, 2 lots plus home) to Doug Eckerson for $20,000.00. Then on March 10, 2006, as the Personal Representative, Georgia filed an inventory and appraisement indicating that the sole asset of the estate was the land, which she claimed was valued at only $20,000.0 (a nominal $15.38 per acre/without including the 2 lots and home). *Inventory and Appraisement, Schedule A.*

Sometime in late May of 2006, Georgia caused two checks to be issued from the Estate's trust account in the amount of $10,000.00 each to William III and Julie, which supposedly represented their respective share of the proceeds from the sale of the land to Doug Eckerson. *P.R.'s Sworn Statement to Close Estate.*

Thereafter on June 1, 2006 Georgia filed a Final Accounting and a Personal Representative's sworn statement to close the estate. *Final Account.* In those documents she represented that the estate had only the land with a value of $20,000.00, which she sold to Eckerson, and then purportedly distributed the

proceeds of the sale to William III and Julie in the amount of $10,000.00 each. *Final Account* and *P.R.'s Sworn Statement to Close Estate, pg.1-2.*

Then, on December 1, 2006, Angela Wyrick Conway and Kathleen R. Big Spring (the mother of the Deceased) filed their Petition for Formal Determination of Testacy and Heirs and Supervised administration of the estate. *Petition for Determination of Heirs, Intestacy and Supervised Administraton.* They also sought to set aside any and all transactions between Georgia as personal representative on behalf of the estate and Doug Eckerson on grounds of conflict of interest (Georgia and Eckerson are husband and wife) and breach of fiduciary duty. *Id.* Contemporaneous therewith, Angela filed a Notice of Lis Pendens against all the land purchased from the estate by Doug Eckerson. After several hearings, Kathleen voluntarily withdrew her Petition, and Angela was determined to be a natural child of the deceased William F. Big Spring Jr..

In January of 2008, Doug Eckerson filed a Creditor's Claim against the estate in the amount of $73,839.21 for funds supposedly advanced to the Personal Representative (Georgia) for administrative expenses of the estate, to purchase property from the estate and for improvements allegedly made to that property after his purchase of it. *Doug Eckerson's CLAIM AGAINST ESTATE.* In that claim, Doug Eckerson asserts that his purchases of the land should be upheld because he and Georgia were divorced as the result of a "Decree of Dissolution . . .

entered by the Blackfeet Tribal Court, for the Blackfeet Indian Nation, Case No. 98.CA-219, on July 23, 1998." *Id.* (both Georgia and Doug are non-Indians).

While the matter was pending trial, a mediation was held in April of 2008, with Angela, William III, Doug Eckerson and Georgia Eckerson attending personally, and Julie Big Spring being consulted telephonically. *Eckerson's Response Brief to Motion to Dismiss, pg. 3, and Exhibit B.* An agreement was apparently reached which required Doug Eckerson to return all land to the estate which he purchased from the Personal Representative Georgia Eckerson. *Id.* That land was then apportioned between Angela and William III and Julie. *Id.* William III signed the Agreement for his sister Julie. *Id.*

In early May of 2008 a second agreement was supposedly reached between William III and Julie and Eckerson. That agreement purported to give Doug Eckerson land from the estate near East Glacier in settlement of his creditor's claim. *Eckerson's Response Brief to Motion to Dismiss, pg. 3, and Exhibit C.* The circumstances surrounding that agreement are not clear from the record. (document is dated as entered April 6, 2008, but signatures not given until May 6, 2008)

Thereafter, Georgia Eckerson discontinued contact with everyone (except Doug Eckerson), including counsel for the estate. The matter lay dormant until March of 2009 when Doug Eckerson filed his first Motion to Enforce Settlement

Agreement or alternatively to lift the Lis Pendens. *Motion to Enforce Agreement.* Counsel for the estate then withdrew based on Georgia's (the P.R.) lack of contact. *Motion for Leave to Withdraw as Counsel.*

No action was ever taken by Georgia as the Personal Representative to complete either settlement agreement. Up to that point, William III and Julie did not have independent representation, instead relying on their mother, Georgia.

In September of 2009, Doug Eckerson renewed his Motion to lift Lis Pendens, and Agnela filed a reply. *Motion To Lift Lis Pendens; Angela's Response to Motion to Lift Lis Pendens.* William III and Julie Big Spring then filed their Motion to Dismiss the underlying probate action for lack of jurisdiction. The parties are now before this court on William III and Julie's appeal from the District Court's decision denying their Motion to Dismiss for Lack of Subject Matter Jurisdiction.

STANDARD OF REVIEW

Review of a district court's decision to dismiss for lack of jurisdiction is de novo. *Morigeau v. Gorman* (2010), 210 MT 36, ¶6 , ___Mont.___, ¶6, ____P.3d.___, ¶6. When deciding a motion to dismiss based upon lack of subject matter jurisdiction, the district court must determine whether the complaint states facts that, if true, would vest the court with jurisdiction. *Id, citing Liberty*

Northwest Ins. v. State Fund, 1998 MT169, ¶7, 289 Mont. 475, 962 P.2d 1167. *Cf. General Constructors Inc. v. Chewculator, Inc.*, 2001 MT 54, ¶16, 304 Mont. 319, ¶16, 21 P.3d, 604, ¶16 (district court's determination that it lacks subject matter jurisdiction is conclusion of law reviewed for correctness), *citing In re McGurran*, 1999 MT 192, 295 Mont. 357, 983 P.2d 968, ¶7.

LAW AND ARGUMENT

Pursuant to applicable Federal Indian law and Montana state law principles, the Blackfeet Tribe has inherent sovereignty over the probate of the estate of the deceased, William F. Big Spring, Jr., who at the time of his death, was a resident of the Blackfeet Reservation and owned no property outside the Reservation boundaries. The Federal government has long recognized the Tribe's retained sovereignty in the area of inheritance of its own members and their property within the Reservation, including Indian fee property.

For the State District Court to assume jurisdiction over the probate of the estate of William F. Big Spring Jr., on these facts, is an unlawful infringement on tribal self-government. Montana has never met the necessary Federal requirements to assume jurisdiction over the reservation-based activities of Blackfeet Tribal members. The District Court's decision finding that it had jurisdiction is therefore wrong, and must be reversed.

Subject matter jurisdiction is a threshold issue which may be raised at any time, by any party. Procedural considerations are irrelevant in determining whether the court had the power and authority to act in the first instance.

A. SUBJECT MATTER JURISDICTION - TIMING.

Before turning to the principal argument regarding the District Court's lack of subject matter jurisdiction in this case, a review of the rules regarding the timing of a motion to dismiss based on lack of subject matter jurisdiction is appropriate. Especially in light of the District Court's references to William III and Julie's participation in that proceeding. See *Order Denying Motion to Dismiss*, pg. 2, 6.

It is settled law in this court, that "the issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding, and that once the court determines that it lacks subject matter jurisdiction, it can take no further action in the case other than to dismiss it." *Wippert v. The Blackfeet Tribe*, 260 Mont. 92, 103, 859 P.2d 420, 425 (1993) (jurisdiction successfully raised after 17 years of litigation and two prior appeals). "Jurisdiction involves the fundamental power and authority of a court to determine and hear an issue." *Stanley v. Lemire* , 2006 MT 304, ¶30, 334 Mont. 489, ¶ 30, 148 P.3d 643, ¶ 30. For this reason, jurisdictional issues "transcend procedural considerations." *Id.*, quoting *Thompson*

v. Crow Tribe of Indians, 1998 Mt 161, ¶ 12, 289 Mont. 358, ¶ 12, 962 P.2d 577, ¶ 12.

Importantly, subject matter jurisdiction cannot be conferred by the consent of a party. *Indian Health Board of Billing, Inc. v. Montana Department of Labor and Industry, et al.*, (2008), 2008 MT 48, ¶ 20, __Mont.___, ¶ 20, ___ P.3d ___, ¶ __; *Thompson v. State*, 2007 MT 185, ¶ 28, 38 Mont. 511, ¶ 28, 167 P.3d 867, ¶ 28; *In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378, 1389 (1993). In short, "lack of jurisdiction over the subject matter can be raised at any time and a court which in fact lacks such jurisdiction cannot acquire it even by consent of the parties." *Corban v. Corban, 161 Mont. 93, 96, 504 P.2d985, 987 (1972).*

If the District Court in this instance lacked subject matter jurisdiction, William III and Julie's participation in that proceeding, for however long and regardless of the nature of that participation, is irrelevant here. That participation cannot serve to override or veto the controlling jurisdictional rules, and somehow vest jurisdiction where none exists.

B. TRIBAL SOVEREIGNTY AND TRIBAL COURT JURISDICTION.

Inherent tribal sovereignty includes the exclusive authority to regulate through rules of inheritance the estates of tribal members resident on their reservations at the time of death, and to enforce those rules in tribal court. Long-

standing Federal case law and policy support retained tribal sovereignty in the area of inheritance, including over Indian fee land.

1. Tribe's Retain Exclusive Jurisdiction over the Inheritance and Probate of their Members Resident on their Reservation

In conducting the jurisdictional analysis to resolve the issue of tribal court versus state court jurisdiction, the Montana Supreme Court observes "the United States Supreme Court's holdings regarding the retained sovereignty of Indian tribes and the extent of tribal civil authority." *Zempel v. Liberty*, 2006 MT 10, ¶ 20, 333 Mont. 417, 143 P.3d 123. The presence of Indian tribes on this continent as sovereign, self-governing nations pre-dates the arrival of European settlers and the creation of the United States government. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973); *Talton v. Mayes*, 163 U.S. 376 (1896). As first declared by the U.S. Supreme Court, Indian tribes were "distinct political communities, having territorial boundaries, within which their authority [was] exclusive", and state law could have no force or effect. *Worcester v. Georgia*, 6 Pet. 515, 557-561 (1832); *United States v. Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883).

Nonetheless, it is true, that modern case law has systematically found that Tribes are no longer possessed of the full attributes of sovereignty, especially with respect to the conduct of non-Indians, and their activity on fee lands within a

reservation. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Montana v. United States*, 450 U.S. 564, 565 (1983); *Strate v. A-1 contractors*, 520 U.S. 438, 446 (1997); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430 (1989).

However, the sovereign power of Tribes over their members and their territories has not been significantly diminished. Thus, as this Court recognizes even today, the U.S. Supreme Court has stated:

> Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations. **They have power to make their own substantive law in internal matters, [including rules regarding** membership, **inheritance** , and domestic relations], **and to enforce that law in their own forums.**

Zempel, 2006 MT at ¶ 20, 333 Mont. 417, 143 P.3d 123, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (internal citations and quotations marks omitted)(emphasis added); *Accord*, *Yellowstone County v. Pease*, 96 F.3d 1169, ¶23 (9th Cir. 1996) (". . . in addition to the power to punish tribal offenders, the **Indian tribes retain their inherent power to** determine tribal membership, to regulate domestic relations among members, and **to prescribe rules of inheritance for members.**") (citing *Montana v. United States*, 450 U.S. 544, 564) (citations omitted from original) (emphasis supplied).

The U.S. Supreme Court has consistently acknowledged that inherent tribal sovereignty extends to tribal members and their territory. *Atkinson Trading Co. Inc., v. Shirley*, 532 U.S. 645, 650-651 (2001); *United States v. Mazurie*, 419 U.S. 544, 577 (1975). No United States Supreme Court case has ever held that a tribe's inherent sovereignty did not extend to fee land owned by Tribal members within their own reservation.

Applying these Federal rules to the facts of this case, compels the conclusion that the Blackfeet Tribe retains inherent sovereignty to regulate, through laws of descent and distribution, the inheritance of tribal members who die resident on the Blackfeet Indian Reservation. This inherent sovereignty extends to all the property of the deceased tribal member which is located on or within the Blackfeet Indian Reservation, including Indian fee land, except property held in trust for the tribal member by the United States government.

2. Exclusive Tribal Inheritance and Probate Jurisdiction Over Indian Fee Land is Supported by Federal Policy and Regulation.

Importantly it has been the long held belief of the Federal government, that the inherent sovereignty of Indian tribes' to regulate their members and their territory, through laws of inheritance, extends to Indian fee land. In the famous Solicitor's Opinion entitled "*Powers of Indian Tribes*", written contemporaneous with the adoption of constitutions by tribes pursuant to the *Indian Reorganization*

Act of 1934, 25 U.S.C. Sec. 461 et seq., the Solicitor determined that tribes' inherent power included the power to, "prescribe rules of inheritance with respect to all personal property and **all interests in real property other than regular allotments of land.**" *Opinions of the Solicitor*, 55 I.D. 14. (emphasis added).

Similarly, the Blackfeet Constitution empowers the Tribal Council, to "**regulate the inheritance of real and personal property other than allotted lands within the Blackfeet Reservation**, subject to review by the Secretary of the Interior." *Constitution of the Blackfeet Tribe of the Blackfeet Indian Reservation, Article VI. Sec.1. (l).* (emphasis added). This Federal view of inherent tribal sovereign power over inheritance of tribal members and their property located within a reservation, has prevailed for more than a century. *See Jones v. Meehan*, 175 U.S. 1(1899) (upholding tribe's right to prescribe rules of inheritance of unrestricted fee land owned by tribal member within reservation); *See generally, F. Cohen, Handbook of Federal Indian Law, 1982 Ed.*, pgs. 632-633.

The current Code of Federal Regulations continues this Federal view of the probate jurisdiction of Indian tribes over tribal members and their territory. Part 11 of Title 25 of the Code of Federal Regulations codifies the Court of Indian Offenses (basically Bureau of Indian Affairs run tribal courts). Subpart E, Sections 11.500 through 11.911 provide the law for civil jurisdiction and procedure. Section 11.700 reads in full:

> Section 11.700 Probate Jurisdiction. **The Court** of Indian Offenses **shall have jurisdiction to administer in probate** the estate of a deceased Indian who, **at the time of his** or her **death was domiciled or owned real or personal property situated within Indian Country** under the jurisdiction of the Court **to the extent that such estate consists of property which does not come within the jurisdiction of the Secretary of the Interior.**

25 Code of Federal Regulations, Section 11.700. (Emphasis added).

"[R]eal property situated within Indian Country . . . which does not come within the jurisdiction of the Secretary of the Interior", 25 CFR Sec. 11.700, is Indian fee land. The phrase "Indian Country" as used in the cited regulation appears to be a reference to Title 18, Sec. 1151 of the United States Code which is a Federal statutory definition of "Indian Country".

As set forth in 18 U.S.C. Sec. 1151, the term Indian Country is defined as follows:

> [T]he term "Indian Country", . . ., means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running though the reservation, (b) all dependent Indian communities within the border of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of -way running through the same.

This definition has been accepted by the U.S. Supreme Court for civil jurisdiction purposes. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

It would thus seem evident that the Secretary of the Interior believes that Indian tribes have retained sovereignty over the probate of the estates of tribal members, including fee land of their members located within their own reservations.

Further there are strong federal policies favoring exclusive tribal jurisdiction expressed in the new federal *American Indian Probate Reform Act,* 25 U.S.C. Sec. 2201 *et seq.*. In the AIPRA, Congress has declared a federal policy of restricting the transfer of Indian trust land to non-Indians. This is accomplished through new laws allowing the ultimate inheritance Indian trust land only by tribal members or the Tribe itself.

While that Act has no direct impact on a Tribe's otherwise recognized inherent jurisdiction over a Tribe's citizens and its territory, including probate jurisdiction, the new law provides a mechanism for tribes to control even the inheritance of Indian trust land - an area now within the exclusive federal jurisdiction. 25 U.S.C. Sec. 2205. No similar language is offered for state law, and the new Indian Probate Reform Act adopts its own rules of intestate descent and distribution, completely eliminating any former reliance on state law. *See* 25 U.S.C. Sec. 2206(a).

The *American Indian Probate Reform Act, 25 U.S.C. Sec. 2201 et seq.*, thus represents a strong Federal policy supporting tribal jurisdiction over the inheritance of the tribal members resident on their own reservation.

Against this backdrop of historic tribal sovereignty, it is clear that the Blackfeet Indian Tribe retains inherent sovereignty to regulate through rules of inheritance the non-trust estates of tribal members resident on the Blackfeet Indian Reservation at the time of their death and to probate the estates of tribal members in the Blackfeet tribal court. No legal authority exists to exclude fee land owned by a tribal member within their own reservation from the probate of the estate.

As an exercise of the Tribe's retained sovereignty, the Blackfeet Tribal Court therefore has exclusive jurisdiction to probate the estate of the deceased William Forrest Big Spring, Jr., including his fee land, because he was resident on the Reservation at the time of his death and his entire non-trust estate is located within the exterior boundaries of the Blackfeet Indian Reservation.

In this context, the Tribal Court's jurisdiction is exclusive, and the District Court's assumption of jurisdiction is without authority.

C. STATE COURT JURISDICTION.

The State District Court's assumption of jurisdiction in this case, on these

facts, is a violation of Federal law and an unlawful infringement on Tribal self-government.

1. The State District Court Lacked Subject Matter Jurisdiction.

Two related, but independent barriers prohibit the assumption of state court jurisdiction in this case. Because it did not consider fully the applicable legal standards recognized in both Federal and state law, the District Court's analysis was flawed and resulted in an incorrect conclusion.

a. The State has not complied with the requirements of Federal law.

As a pre-requisite to the exercise civil jurisdiction over the activities of tribal members on their own reservations, both the state and the applicable Indian tribe must comply with the requirements of Title IV of the *Indian Civil Rights Act of 1968*, 25 U.S.C. Sec. 1321-1326. That has not taken place here. The state district court's assumption of jurisdiction is therefore invalid.

Prior to a valid assumption by the District Court of subject matter jurisdiction over the probate of the estate of William F. Big Spring, Jr., the State of Montana would first have to amend its Constitutional enabling language. *See* 25 U.S.C. Sec. 1324. And, the Blackfeet Tribe would have to conduct a referendum vote of tribal members to accept the state assumption of jurisdiction. 25 U.S.C. Sec. 1326. These Federal statutory requirements have been held to be absolute

pre-requisites to the assumption of state civil jurisdiction over tribal members on their own reservation. *Kennerly v. District Court*, 400 U.S. 423, 423-430 (1975). Neither pre-requisite has been met here. The failure to meet the Federal statutory requirements, precludes the assertion of jurisdiction by the District Court over the underlying probate proceeding. *See also Williams v. Lee*, 358 U.S. 217 (1959).

Title IV of the *Indian Civil Rights Act of 1968*, 25 U.S.C. Secs. 1326, therefore is an absolute bar to the exercise of state civil jurisdiction over inheritance of tribal members on their own Reservation, until and unless the conditions set forth therein are met. *Kennerly, Williams.*

b. The District Court's assumption of jurisdiction impermissibly infringes on the Blackfeet Tribe's right of self-government.

Independent of the Federal statutory requirement, the District Court's assumption of jurisdiction in this case, unlawfully infringes on the right of the Blackfeet Tribe to prescribe rules of inheritance for its own members and enforce those laws in its own court. "[B]efore a district court may exercise subject matter jurisdiction over an action involving matters arising on a reservation it must determine whether federal law has preempted state jurisdiction, whether the exercise of state jurisdiction would interfere with tribal self-government, and whether the tribal court is exercising jurisdiction in such a way as to preempt state

jurisdiction." *Morigeau v. Gorman*, 2010 MT 36, ¶ 11, *citing Iron Bear v. District Court*, 162 Mont. 335, 346, 512 P.2d 1292, 1299 (1973).

In applying the *Iron Bear* test, the state lacks subject matter jurisdiction if either of the first two prongs , of the three-part test are met. *General Constructors, Inc. v. Chewulator, Inc.,* 2001 MT 54, ¶ 25, *citing Milbank Mut. Ins. Co. v. Eagleman*, 218 Mont. 58, 61, 705 P.2d 1117, 1119 (1985). Under the second prong of the *Iron Bear* test, a "tribe's interest in self-government for civil matters arising within a reservation's boundaries can be implicated in one of two ways: (1) when a state or federal court resolves a dispute that impinges upon the tribe's right to adjudicate controversies arising within the "province of the tribal court"; and (2) the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a government body." *Id.* (citations omitted).

Focusing solely on the fee status of the Big Spring land, and not the self-government issues, the District Court concluded that because tribal authority over fee land was not plenary, the district court's exercise of jurisdiction did not interfere with tribal self-government. The District Court's analysis was flawed, and its conclusion incorrect.

First, as noted above, a primary Federal law, the *Indian Civil Rights Act,* 25 U.S.C. Secs. 1321-1326, has preempted the exercise of state civil jurisdiction

unless and until the pre-requisites to the assumption of that jurisdiction have been met. Pursuant to the applicable law, the inquiry could end here. However, the District Court's assertion of jurisdiction is also barred because it impermissibly interferes in tribal self-government.

"The purpose of probate is the just and equitable transfer of estate property to the proper heirs." *Estate of Standing Bear v. Belcourt*, 193 Mont. 174, 631 P.2d 385 (1981). Prescribing rules of inheritance for its own members, and thus establishing the law by which the "proper heirs" are determined, is a retained sovereign power of Indian tribes. *Supra*, Part 2. pgs.10-15.

"Inheritance is perhaps the most traditional and customary aspect of tribal law, and state jurisdiction would probably represent the greatest intrusion imaginable on the right of Indians to manage their internal affairs." *Canby, Am. Ind. Law NS, 2nd ed. (1994), pg. 165.* Thus with respect to the second prong of the *Iron Bear* test, the issues of who are the proper heirs of a tribal member resident on the Blackfeet Indian Reservation at the time of his death, what is the property of the estate (what did the tribal member own), and how should that property be distributed, are all controversies within the "province of the tribal court."

Of course related to the probate, would be settlement of claims against the estate by both Indians and non-Indians. It is already established law that tribal

courts have exclusive jurisdiction over reservation based claims by non-Indians against tribal members resident on their own reservation. *Kennerly v. District Court,* 400 U.S. 423; *Williams v. Lee*, 358 U.S. 217 (1957). It is axiomatic that the Tribe would have exclusive jurisdiction over claims by other tribal members against the Big Spring estate which arose out of Reservation based transactions.

As Judge Canby stated, there could not be a more direct intrusion in and interference with Tribal self-government than the district court's assumption over the probate proceeding of a Blackfeet tribal member resident on the Reservation at the time of his death. Indeed, in the instant case, the District Court was called on to determine whether Angela was a natural child of the deceased (William Big Spring, Jr.). In so doing, the district court resolved a matter within the province of the Tribal court and directly abridged the Blackfeet Tribe's right of tribal self-government.

In other areas of inherent tribal sovereignty, this Court has recognized the exclusive jurisdiction of tribes, and has deferred as a matter of comity to exclusive tribal court jurisdiction in matters clearly internal to tribes. *Fisher v. District Court*, 424 U.S. 382 (1976)(exclusive tribal jurisdiction over adoption of tribal members resident on their own reservation); *In re the Marriage of Limpy*, 195 Mont. 314, 636 P.2d 266 (1981) (exclusive tribal court jurisdiction over domestic relations matters of tribal members resident on their own reservation). This Court

has likewise acknowledge that: "Tribes have the sole power to determine tribal membership unless otherwise limited by statute or treaty." *In re the Matter of A.G.*, 2005 MT 81, ¶13, __ Mont. __, __ P.3d. __.

Viewed in the context of this Court's own precedent in respect of and deference to the self-governing powers of the State's Indian Tribes, the District Court's exercise of jurisdiction over the probate of the estate of William F. Big Spring, Jr., an enrolled Blackfeet Tribal member resident on the Reservation at the time of his death, where the only assets of his estate are located entirely within the Blackfeet Indian Reservation, impinges on the right of the Blackfeet Tribe to adjudicate controversies arising within the province of the tribal court, and is therefore an impermissible infringement on tribal self-government.

As to the last prong of the *Iron Bear* test (whether the tribal court is exercising jurisdiction) it is common judicial knowledge that the Blackfeet Tribe has a functioning court system. *Wippert v. Blackfeet Tribe*, 201 Mont. 299, 654 P.2d 512 (1982) and *Wippert v. Blackfeet Tribe*, 215 Mont. 85, 695 P.2d 461 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Blackfeet Tribal Court routinely exercises jurisdiction over the probate actions of tribal members resident on the Reservation at the time of their death, including estates involving Indian fee land. *See In re the Estate of Dan Boggs*, 2008 P 21 (Blackfeet Tribal Court).

Further, in applying the test set forth in *Iron Bear v. District Court*, 162 Mont. 335, 512 P.2d 1292 (1973), the Montana Supreme Court has not required that the interested Tribe actually be exercising jurisdiction in a given case, only that the Tribe have a forum for adjudication of the dispute and a demonstration that the Tribe is exercising jurisdiction over such cases. See *State ex rel. Stewart v. District Court*, 187 Mont. 209, 609 P.2d 290 (1980); *Milbank Insurance Co. v. Eagleman*, 218 Mont. 58, 705 P.2d 1117 (1985); *Geiger v. Pierce*, d233 Mont. 18, 758 P.2d 279 (1988).

While the Blackfeet Tribe does not yet have a probate code, pursuant to its choice of law provision, when not following traditional law, it follows either the American Indian Probate Reform Act or the Uniform Probate Code when necessary. *See Chapter 2, Sec. 2, Blackfeet Law and Order Code of 1967 as amended.*

It is abundantly clear that applying the *Iron Bear* test to the facts of this case, the District Court wrongly concluded that its assumption of jurisdiction did not unlawfully infringe on tribal self-government. All three prongs of the three part *Iron Bear* test must be resolved in favor of tribal court jurisdiction, and against state district court jurisdiction.

In this regard, the District Court's reliance on both *Standing Bear v. Belcourt*, 193 Mont. 174, 631 P.2d 385 (1981) and *Plains Commerce Bank v. Long Family Land & Cattle Co, Inc..*, 128 S.Ct. 2709 (2008), is misplaced.

2. Estate of Standing Bear.

The District Court relied in part on the Montana Supreme Court's decision in *Estate of Standing Bear v. Belcourt*, 193 Mont. 174, 631 P.2d 285 (1981). In the District Court's view, "*Standing Bear* does . . . recognize that an Indian may have his estate probated by the District Court despite being domiciled at the time of death within the exterior boundaries of the Blackfeet Reservation." *Order Denying Motion to Dismiss*, pg. 5. Based on a plain reading of *Standing Bear*, the district court misapprehends the holding , and in fact, that case actually supports the Big Spring Heirs' assertion of no jurisdiction here.

In that case, Standing Bear, the deceased, was an enrolled member of the Arapaho Tribe of the Wind River Reservation in Wyoming, who happened to be resident on the Rocky Boy's Reservation at the time of his death. Upon his death, Standing Bear's wife filed in the State District court for appointment of personal representative and probate of his estate.

After being restrained in State court from disposing of estate property and being removed as the personal representative, the widow then filed a Petition in the

Chippewa Cree Tribal Court (then a Court of Indian Offenses) to probate the estate. However, after first issuing various orders in the case, the Tribal Court issued an order vacating all prior orders made in the Standing Bear estate for the reason that the it did not have jurisdiction over the estate since Standing Bear was not an enrolled member of the Chippewa Cree Tribes. *Id.*; Cf. *Zempel v. Liberty, et al.*, 2006 MT 220, ¶ 27, citing *Nevada v. Hicks* 533 U.S. 353, 357, n.2 (2001). (Indians who are enrolled in a federally recognized Tribe, but are living on an Indian Reservation of a tribe other than their own Tribe, are non Indians for civil jurisdictional purposes.)

The decision in *Standing Bear* is correct because Standing Bear was not a member of the Chippewa Cree Tribes of the Rocky Boy Reservation, and therefore tribal self-government was not implicated. And, the tribal court had expressly disclaimed the jurisdiction that it had asserted. Lastly, given that the issue was jurisdiction over the estate of a non-Indian and the personal property of that estate, no Federal statute or treaty preempted the exercise of the state's jurisdiction in that case.

Such an outcome is entirely consistent with William III and Julie's assertion that because their dad, William Big Spring II, was an enrolled member of the Blackfeet Indian tribe and resident on his own reservation at the time of his death, the Blackfeet Tribal court has exclusive jurisdiction over the probate of his estate,

including and in particular claims of creditors for work supposedly done on land within the Reservation.

The Blackfeet Tribe through the Tribal Court, is clearly exercising its retained sovereignty over its members and its territory. The Tribe is providing a forum for the probate of the estates of enrolled Tribal members, it is actively exercising jurisdiction in such cases and has not disclaimed jurisdiction over this case. On these facts, applying the case law of this Court, *Standing Bear v. Belcourt* supports the position of William III and Julie that the District Court's assertion of jurisdiction was wrong.

Standing Bear provides no support for the District Court's decision here.

3. District Court decision and the *Plains Commerce Bank* case.

The primary basis for the District Court's decision appears to be the principal set forth in the case of *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008) regarding the alienability of fee property and the lack of tribal court jurisdiction over non-Indian fee property. The United States Supreme Court held in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008) that tribal courts lacked jurisdiction to impose restraints on the transfer of non-Indian fee land within a reservation. The lynch-pin of the

Plains Court's holding was the principle that "free alienability by the holder is a core attribute of the fee simple", *Plains Commerce Bank*, 128 S.Ct at 2719.

The District Court's reliance on *Plains Commerce Bank* is also misplaced for several reasons. First, the land at issue in this case is Indian fee land, not non-Indian fee land. Second, neither the exclusive exercise of Tribal probate jurisdiction or the right of the Tribe to prescribe rules of inheritance for its members, impedes or imposes restraints on the free alienability of that Indian fee land.

In *Plains Commerce Bank*, the land which was at issue was fee land previously owned by Long's non-Indian father. That land had been acquired by Plains Commerce Bank through a prior mortgage and foreclosure, and was subsequently sold by the Bank to another non-Indian. At the time of the tribal court action in that case, the land had been owned in fee by non-Indians for a substantial time in the chain of title. That is not the case here. In this case, but for the invalid transfers to Erickson, the land was and is Indian land - first Indian trust land, and then Indian fee land. The jurisdictional analysis must begin with status of the land at the time of death, not with the invalid transfers.

Relying on *Plains*, the District Court seems to make the unprecedented assertion that even Indian fee land is beyond the jurisdiction of the Tribe. *Order*

Denying Motion to Dismiss, pg. 5& 6. First, it is again worth noting, that no case from the U.S. Supreme Court has ever made such a holding. Second the cases cited by the District Court are all cases involving tribal authority over **non-Indian fee land**. *Plains Commerce Bank v. Long Family Land & Cattle Co. Inc.*, 128 S.Ct. 2709; *Brendale v. Confederated Tribes of Yakima Nation*, 492 U.S. 408 (1989); and, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 261 (1992). The district court has cited no cases where such a holding, regarding tribal authority, has been applied to Indian fee land.

Case law has held that the only aspect of state jurisdiction which applies to Indian fee land, is the right of the state to levy ad valorem property taxes. *County of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251 (1992); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). In those cases the U.S. Supreme Court has found that Congress had made its intention to authorization state taxation of Indian fee land "unmistakably clear". *Cass County*, 503 U.S. at 110, *citing Yakima*, 502 U.S. 258 (*quoting Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This result is derived from the general rule that states may not tax Indian land absent cession of jurisdiction or other federal statutes expressly permitting it. *Yakima*, 502 U.S. at 258 (internal citation omitted).

No federal statute authorizes the extension of state district court probate jurisdiction over Indian fee land within a reservation. Nor has there been aBI cessation of jurisdiction by the Blackfeet tribe.

And, while the *Plains Commerce Bank* court anchored its holding on the notion that "free alienability", *Plains Commerce Bank*, 128 S.Ct at 2719, that attribute is not undermined, nor is free alienability restricted or impeded, by the exercise of exclusive tribal court probate jurisdiction. Indeed, all the same transactions which purportedly occurred through the administration of the probate of the decedent's estate in the district court, could take place in the Blackfeet Tribal Court.

Taken to its logical extreme, the District Court's conclusion would not only extend state probate jurisdiction to all Indian fee land within a reservation, even tribal fee land, it would extend all aspects of state regulatory and adjudicatory jurisdiction to these Indian owned lands. The result would be at least concurrent jurisdiction, and could ultimately deprive tribe's of all jurisdiction over Indian fee land within a reservation, and conversely extend exclusive state jurisdiction to such land. Again, no case has ever made such a holding. Other than lifting the restrictions against alienation of the land without the approval of the Secretary of the Interior, the only aspect of fee simple status which directly allows an exercise of state jurisdiction is in the area of taxation.

Just as Tribally owned fee land within an Indian reservation is considered part of the Tribe's "territory", so too is individually owned tribal member Indian fee land which is located within an Indian reservation. The fact that Big Spring's estate includes Indian fee land, does not vest the district court with probate jurisdiction over the estate. Nor does it result in divesting the Blackfeet Tribal Court of its inherent jurisdiction over the inheritance and probate of its members who die resident on the Reservation at the time of their death and whose only property is located on the Reservation at the time of death.

Again, the District Court's reliance on William III and Julie's participation in this matter is inapposite in light of the jurisdictional rules governing subject matter jurisdiction. *See Supra*, Part A. Similarly the District Court's suggestion that William III and Julie erred by not asking the Interior Probate Judge to consolidate this matter with the proceedings in that case, seems to demonstrate a misunderstanding of the nature of Federal Indian law particularly as it concerns the probate jurisdiction of the Interior Department over Indian estates. The Federal government does not take jurisdiction over the non-trust property of Indians. The Bureau of Indian Affairs probate proceedings are limited to Indian trust property. See 25 C.F.R. Sec. 15.3(b)(1)(BIA will not probate real or personal property of an Indian decedent, other than trust or restricted land, or trust personalty).

Indian tribes' retained sovereign power to prescribe rules of inheritance for their own members and their members property located within their own reservation, and to enforce those rules in tribal courts, is a purely intertribal matter. In these matters, as stated by the United States Supreme Court, "[t]he policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Commission*, 414 U.S. 164 (1973) *citing Rice v. Olson*, 324 U.S. 786, 789 (1945). William III and Julie respectfully urge this Court to honor that "deeply rooted" policy here.

CONCLUSION

The Ninth Judicial District Court lacked subject matter jurisdiction over the probate of the Estate of William Big Spring, Jr.. The District Court's decision was wrong and must be reversed. The matter should be remanded with direction to grant William III and Julie's motion to dismiss for lack of subject matter jurisdiction.

DATED this ___ day of May, 2010.

Joe J. McKay, Attorney-at-Law
Attorney for William Big Spring III and
Julie Big Spring

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Appellant's Brief, and that I served a true and accurate copy of the foregoing Appellant's Brief with the Clerk of the Montana Supreme on May 6, 2010; and that I have served true and accurate copies of the foregoing Appellant's Brief upon each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, by U.S. Mail, postage prepaid thereon, at their addresses as listed in the court record, as follows:

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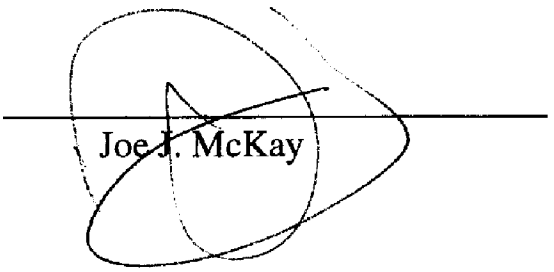
DATED this 6th day of May, 2010.

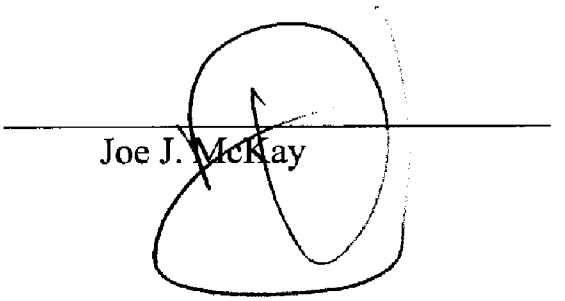


Joe J. McKay

CERTIFICATE OF COMPLIANCE

Pursuant to Rule **16(3)** of the Montana Rules of Appellate Procedure, I certify that this Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2007, is not more than 7,532 words, excluding certificate of service and certificate of compliance.

DATED this 6th day of May, 2010.



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